

<sup>1</sup> Elton Depo., Ex. A; Galate Depo., Ex. A.

ISSUES

In the December 5, 2011, Award, ALJ Hursh found claimant sustained a 20% whole body functional impairment and a 70.5% work disability. Permanent partial disability benefits were awarded based on those findings. The work disability determination was based on a 41% task loss and a 100% wage loss. The ALJ did not award claimant future medical benefits, relying on the amended version of K.S.A. 44-510h which became effective on May 15, 2011.

Claimant contends she is entitled to receive future medical benefits upon proper application to the Director of Workers Compensation. Claimant argues the ALJ erred in retroactively applying the provisions of K.S.A. 2011 Supp. 44-510h in violation of K.S.A. 44-505(c).

Claimant asserts that if the Board concludes K.S.A. 2011 Supp. 44-510h should be retroactively applied to this claim, claimant is nevertheless entitled to future medical compensation because claimant proved it is more probably true than not true that future medical treatment will be required as a result of the compensable injuries in this claim.

Claimant also maintains that if K.S.A. 2011 Supp. 44-510h is applied to this claim so as to deny future medical treatment, then that provision of the New Act violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

With regard to the nature and extent of claimant's impairment and disability, claimant maintains she has a 33% whole body functional impairment and a 90.5% work disability (81% task loss plus 100% wage loss equals 181% divided by 2 equals 90.5%).

Respondent contends that the Board should modify the Award to find that claimant sustained a 5% whole body functional impairment and a 50% work disability (0% task loss plus 100% wage loss equals 100% divided by 2 equals 50%). Respondent argues the Board should hold that the ALJ correctly applied the recently amended K.S.A. 44-510h to this claim and that the ALJ's denial of future medical benefits should be affirmed.

Accordingly, the issues presented to the Board for review are:

- (1) The nature and extent of claimant's functional impairment and work disability.
- (2) Whether claimant is entitled to future medical compensation.
  - (a) Whether the New Act or Old Act version of K.S.A. 44-510h is applicable to this claim.

(b) If K.S.A. 2011 Supp. 44-510h is found to apply to this claim, resulting in a denial of future medical compensation, whether that provision violates the Fourteenth Amendment to the United States Constitution.

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant is currently age 36. When she testified at the January 13, 2010, preliminary hearing she had been employed for respondent for over five years. Her job was Human Resource Manager at one of respondent's retail locations. Her position required a number of duties including lifting, bending, maintaining files, typing, answering incoming calls, filling out forms, and other activities requiring the use of the upper extremities.

On August 15, 2009, claimant was preparing files to be forwarded to respondent's home office. This required claimant to remove files from filing cabinets, load the files into bankers boxes, and carry the boxes from the office area to the store's training room. As she was so engaged, her back began aching a bit. As she was moving one particular bankers box, she felt pain in her low back, neck, buttocks, and right thigh. She developed a headache and "everything tightened up."<sup>2</sup> In addition, claimant experienced tingling and numbness in her fingers, which became bright red. Claimant stopped what she was doing and told the manager on duty about the problems she was having.

Respondent referred claimant to Wyandotte Occupational Health (WOH). Physical therapy was prescribed for claimant's back. Claimant continued to receive treatment from WOH for a period of time, after which she was referred to Dr. David Ebelke, a spine surgeon. Dr. Ebelke recommended epidural steroid injections, which claimant declined. No further treatment was authorized.

Claimant then sought treatment on her own with Dr. Vernon D. Rowe. On September 24, 2009, claimant underwent a lumbar MRI scan, without contrast, which revealed: (1) L5-S1 degenerative changes with prominent central posterior disc protrusion but no evidence of discrete herniation, with moderate right foraminal narrowing and facet arthropathy and (2) L4-L5 disc degenerative changes. On October 13, 2009, claimant underwent EMG/NCV testing of the upper extremities; however, the report of that testing is not in the record.

When she testified at the January 13, 2010, preliminary hearing, claimant continued working for respondent performing her job as Human Resource Manager; however, she

---

<sup>2</sup> P.H. Trans. at 7.

could not perform all of her regular duties because of her injuries. Claimant testified her symptoms worsened as she continued working. The left side of her neck was constantly tight and achy, going down into her shoulder. Her fingers tingled to the point they almost felt numb, and when she raised them to perform typing or similar activities, the tops of her forearms felt like there were little needles in them.

Claimant admitted to having experienced tingling in the fingers of her right and left hands prior to August 15, 2009; however, she sought no medical treatment for those symptoms. Claimant denied any injuries or treatment for her neck or low back before August 15, 2009.

Following the preliminary hearing, the ALJ entered an Order dated January 13, 2010, which directed respondent to provide treatment for claimant's bilateral carpal tunnel syndrome. Respondent authorized Dr. Suzanne G. Elton, an orthopedic surgeon, to treat the carpal tunnel syndrome, and Dr. Joseph F. Galate, a specialist in physical medicine and rehabilitation, to treat claimant's low back.

Claimant testified Dr. Galate prescribed epidural steroid injections, physical therapy, and work hardening. Dr. Galate did not treat claimant's cervical spine. Dr. Elton's diagnosis was bilateral carpal tunnel syndrome, pronator syndrome, and cubital tunnel syndrome. A repeat EMG was performed on February 22, 2010, which showed no evidence of peripheral nerve compression. Under Dr. Elton's care claimant received steroid injections into her wrists, physical therapy, and work hardening. On December 16, 2010, Dr. Elton performed a left endoscopic carpal tunnel release.

Claimant's employment with respondent was terminated on August 26, 2010, for reasons of "[j]ob performance."<sup>3</sup> She has not secured alternate employment since her termination.

At the September 22, 2011, regular hearing claimant testified that her current symptoms include neck pain, which extends into the back of her head and down her shoulders; headaches; decreased range of motion in the neck; low back achiness which radiates down her left leg; and decreased range of motion in the low back. Claimant also experiences symptoms in both upper extremities, consisting of pain, numbness, and "pins and needles."<sup>4</sup>

---

<sup>3</sup> R.H. Trans. at 11.

<sup>4</sup> *Id.*, at 10.

Dr. Galate testified that based on the AMA *Guides*<sup>5</sup> claimant had a 5% whole body functional impairment regarding the low back. It is unclear from Dr. Galate's testimony whether he utilized the *Guides*' DRE method or range of motion model in arriving at his rating.<sup>6</sup> By the time Dr. Galate found claimant had reached MMI, he found no clinical evidence of radiculopathy. Based on the results of the work hardening, Dr. Galate imposed no permanent physical restrictions and found claimant was capable of performing all of the seventeen work tasks identified and described by vocational consultant Michael J. Dreiling.

Dr. Elton testified that she found no impairment of function to claimant's left upper extremity based upon the AMA *Guides*. The only deficit Dr. Elton found on physical examination was a minimal loss of strength that she felt would return to normal. Although she was not formally asked to rate permanent impairment in claimant's right upper extremity, Dr. Elton did not feel claimant would have any. Dr. Elton did not impose permanent restrictions.

Dr. Edward J. Prostic, an orthopedic surgeon, examined claimant at the request of claimant's counsel on four occasions: January 8, 2010; August 10, 2010; April 26, 2011; and May 27, 2011. Dr. Prostic found that claimant sustained permanent functional impairment of 10% to each upper extremity,<sup>7</sup> 15% permanent impairment to the whole body for the cervical spine, and 10% permanent impairment to the whole body for the low back. Dr. Prostic combined his individual impairments into an overall rating of 33% to the body as a whole. Dr. Prostic's spinal ratings were based on the presence of both cervical and lumbar radiculopathy. However, Dr. Prostic admitted that he found no clinical evidence of lumbar or cervical radiculopathy in his final examinations of claimant. Dr. Prostic recommended permanent restrictions consisting of the avoidance of frequent gripping, handwriting, and keying. He testified that claimant can no longer perform fourteen of the seventeen work tasks identified and described by Mr. Dreiling, for an 82% task loss.

Dr. Prostic testified that when he last examined claimant's upper extremities on May 27, 2011, claimant had positive Tinel's tests at both carpal tunnels. Dr. Prostic testified that claimant would benefit from right carpal tunnel surgery and conservative care only for her spinal injuries unless something worsened.<sup>8</sup>

---

<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>6</sup> Cf. Galate Depo. at 9, 19; Ex. 2.

<sup>7</sup> Dr. Prostic converted his ratings of 11% to each forearm to 10% to each extremity.

<sup>8</sup> Prostic Depo. at 22.

**PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e provides in relevant part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Effective on May 15, 2011, K.S.A. 44-510h was amended to add a new subsection, which provides as follows:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical

improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-505(c) provides:

This act shall not apply in any case where the accident occurred prior to the effective date of this act. All rights which accrued by reason of any such accident shall be governed by the laws in effect at that time.

The Kansas Supreme Court recently made the following comments in *Bryant*:<sup>9</sup>

As a preliminary matter, we note that during the 2010 legislative session the Kansas Legislature passed and the Governor signed into law significant changes to the Kansas Workers Compensation Act. See Substitute for H.B. 2134, effective May 15, 2011. These changes included the addition of a requirement that an accident or cumulative trauma be the prevailing factor in causing a compensable injury, medical condition, or resulting impairment. The new law also introduces several exclusions from compensability, including "triggering or precipitating events" and "aggravations, accelerations, or exacerbations of a preexisting condition." The amended statute removes any reference to disabilities resulting from the "normal activities of day-to-day living," although it addresses situations when employment increases risks or hazards to which workers would not have been exposed "in normal non-employment life." Substitute for H.B. 2134, sec. 5.

Despite these modifications, the statutory scheme in place when Bryant was injured and filed his claim continues to control in this case.

As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action "for injuries suffered in person." *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 667, 831 P.2d 958 (1992) (citing the Kansas Constitution Bill of Rights, § 18). The retroactive application of laws that adversely affect substantive rights violates a claimant's constitutional rights, because it constitutes a taking of property without due process of law. *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 190, 883 P.2d 1177 (1994).

---

<sup>9</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 587-589, 257 P.3d 255 (2011).

Nothing in the language of the Substitute for H.B. 2134 suggests that the legislature intended that the sections relevant to the present case be applied retroactively. In fact, the legislature singled out one section, new K.S.A. 44-529(c), for retroactive application and was silent about the application of the remainder of the statutory amendments. In addition, Bryant has a vested right to seek compensation for his injury, and retroactive application would violate due process.

#### **ANALYSIS AND CONCLUSION**

The issue of the nature and extent of claimant's disability requires no extended discussion. The Board has reviewed the evidence regarding claimant's functional impairment and work disability, along with the oral and written arguments of the parties, and finds that the findings and conclusions of the ALJ are supported by a preponderance of the credible evidence and are hereby adopted by the Board.

However, the ALJ's findings regarding future medical compensation must be reversed. In denying claimant future medical compensation, the ALJ relied on K.S.A. 2011 Supp. 44-510h(e) and held that claimant did not overcome the presumption set forth in that subsection that the employer's obligation to provide medical treatment shall terminate upon claimant having reached maximum medical improvement. The ALJ's findings on this issue are erroneous for two reasons:

(1) K.S.A. 44-510h, as amended effective May 15, 2011, is not applicable to this claim because that provision was not in effect when claimant sustained her accidental injuries on August 15, 2009, and it may not be retroactively applied to this claim. The amended version of K.S.A. 44-510h affects the substantive rights of the parties and respondent does not argue otherwise. Clearly, the amended statute is not intended to make a mere procedural change. There is nothing in the language of the New Act which suggests that the legislature intended K.S.A. 2011 Supp. 44-510h(e) to apply retroactively. On the contrary, as noted by our Supreme Court in *Bryant*, only one provision of the New Act is specifically given retroactive application, K.S.A. 44-529(c). Had the legislature intended that K.S.A. 2011 Supp. 44-510h(e) should apply to claims involving accidents before May 15, 2011, it easily could have included language to accomplish that end.

(2) Even if K.S.A. 2011 Supp. 44-510h(e) were applicable to this claim, claimant has proven, by medical evidence, it is more probably true than not true that future medical treatment will be necessary as a consequence of the injuries in this claim. The testifying physicians agree that claimant did reach MMI from the injuries she sustained on August 15, 2009. Accordingly, if K.S.A. 2011 Supp. 44-510h(e) applies, then the presumption did arise that respondent's obligation to provide additional medical treatment terminated when MMI was achieved. However, neither Dr. Galate nor Dr. Elton specifically expressed opinions regarding whether claimant would require future medical care.

Before claimant reached MMI, Dr. Elton had recommended that claimant undergo a right carpal tunnel release in addition to the left carpal tunnel surgery she performed on December 16, 2010. Dr. Elton's opinion in that regard is consistent with Dr. Prostic's opinion that claimant would benefit from carpal tunnel surgery on the right. Although Dr. Elton testified that a repeat EMG performed in February 2010 showed no indication of peripheral nerve entrapment, Dr. Elton recommended bilateral carpal tunnel releases after the repeat EMG testing was performed. It seems quite unlikely that Dr. Elton would have recommended bilateral releases if she felt there was no surgical lesion making operative intervention appropriate. Moreover, Dr. Elton's final chart entry dated March 25, 2011, indicates that claimant "is having some right hand symptoms that she may need treated in the future."<sup>10</sup> Dr. Prostic's last physical examination revealed positive Tinel's tests at both wrists.

Dr. Galate testified that claimant had reached MMI and that she required no additional treatment to the low back at that time. However, Dr. Galate did not testify that no future treatment would be needed for claimant's spinal injuries. Hence, Dr. Prostic's testimony that claimant needs future conservative care unless her condition worsens and that such care "certainly could"<sup>11</sup> include modalities beyond over-the-counter medications and home exercises, is undisputed. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.<sup>12</sup>

Claimant is therefore entitled to future medical treatment upon application to and approval by the Director of Workers Compensation.

The Board concludes as follows:

(1) Claimant is entitled to permanent partial disability compensation based on a permanent functional impairment of 20% to the body as a whole and a work disability of 70.5%, as specifically set forth in the Award.

(2) K.S.A. 2011 Supp. 44-510h(e) is inapplicable to this claim because that provision was not in effect when claimant was injured. Even if that subsection of the New Act were applicable to this claim, claimant has overcome the presumption, by medical evidence, that the employer's obligation to provide medical treatment is terminated. Claimant has proven that future medical treatment will more likely than not be required to treat claimant's injuries in this claim. Claimant's right to future medical treatment remains open upon application to and approval by the Director.

---

<sup>10</sup> Elton Depo., Ex. 2.

<sup>11</sup> Prostic Depo. at 22.

<sup>12</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>13</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board hereby reverses in part the December 5, 2011, Award entered by ALJ Hursh to find that claimant's right to future medical compensation remains open upon application to and approval by the Director. The Award is affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2012.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
cpb@mrwallaw.com

Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier  
drakestraw@mtsqh.com

Kenneth J. Hursh, Administrative Law Judge

---

<sup>13</sup> K.S.A. 2011 Supp. 44-555c(k).